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Professionalism in Lawyering

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COMMENTS FROM THE BENCH

PROFESSIONALISM IN LAWYERING

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One important aspect of your training and capacity for leadership is the professionalism of the lawyer, and it is of that I would like to speak to you briefly today.

This day marks the completion of your formal training for the bar. As you know, a lawyer's training never ends and a young lawyer matures with continuing study and experience. A lawyer who recognizes his professionalism, therefore, will not undertake a task for which he is ill-prepared. For instance, some of you have had courses in securities transactions and know much about the Securities and Exchange Act and the Trust Indenture Act. I am confident, however, that those of you who have not had courses in that field will not think that you are presently prepared to handle a complicated securities issue alone. Even those of you who have had the basic courses would be foolish to undertake such a task without the counsel, advice and review of a more experienced hand.

Oddly enough, however, some lawyers do not recognize this principle when it comes to trial work. Some of you have had courses in evidence and in trial practice, but even those of you who have should not undertake the actual conduct of a trial alone and unguided by a more experienced lawyer, unless you have at least observed competent trial lawyers in action in a number of trials. Those of you who have not had such courses or experience, should not undertake the conduct of a trial until you have carefully prepared yourself for it. The oddity is that some lawyers do. That lack of preparation has led to a movement in the Second Circuit to restrict admission to the district courts in the Second Circuit to lawyers who have prepared themselves for trial work. Most of the law schools are strongly opposed to the movement,

charging that it is an attempt by the federal judges in the Second Circuit to control their curricula. I view it as no such thing. A lawyer can prepare himself for trial work after law school, but the law is so broad in its reach that no lawyer should think himself prepared to do everything that lawyers as a class are called upon to do. Many lawyers live out their lives without ever entering a trial court or entering it only as a consultant to a trial lawyer. Trial work is a specialty, just as handling securities transactions is a specialty. A lawyer should feel himself no more competent alone to handle the one than the other until he has prepared himself adequately for it. The professional will not expose his client to great risk of costly mistakes or inadequate representation.

Of greater moment in the professionalism of a lawyer is the fact that he serves his clients without being their servant. He serves to further the lawful and proper objective of the client, but the lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right, and, as a professional, he cannot give in to a client's attempt to persuade him to take some other stand. Just as a physician may not prescribe a narcotic for a patient simply because the patient wants it, the lawyer must serve the client's legal needs as the lawyer sees them, not as the client sees them. During my years of practice, I never had any problem in this respect, although some lawyers today say they do. I felt I knew more of the law than my client did. If I didn't, they didn't need me. So I told them what would be done and firmly rejected suggestions that I do something else which I felt improper, wasteful and unproductive.

The professional must also take care not to present factual and legal contentions to the courts which are calculated to mislead or to be simply unproductive. A lawyer should never seek to lead a court into erroneous fact finding, and should be aware that his assertion of a legal principle carries with it his own personal, professional endorsement. He owes a duty of loyalty to his client, but he has a higher duty as an officer of the court. We have an adversary system, but the objective to be served is that justice be done, and every lawyer in litigated matters has a duty to see that the system serves the objective. That is why, as a professional serving his client without being his client's servant, he has a duty not to attempt to mislead a judge or to burden the courts with frivolous or unproductive contentions. A lawyer who does not

observe this principle will soon find that the judges are more deaf than attentive when he speaks.

There is a marginal exception to the rule against misleading or unproductive contentions, but it is an exception which need not mar the lawyer's independent professionalism. Since *Gideon*[1] and *Argersinger*,[2] every person accused of a crime for which a jail or prison sentence may be imposed is entitled to a lawyer. If he is indigent, a lawyer must be appointed for him. The indigent usually has no choice in the selection of the lawyer, but he is entitled to adequate representation. One collateral consequence of this service by lawyers is their exposure to charges of inadequate representation if the involuntary client is convicted and the conviction is affirmed on appeal. Such exposure is particularly threatening if the lawyer declines to let the client run the show or to assert any contention or defense, however inappropriate, that the client may suggest. The lawyer can handle the problem, however, by disassociating himself from those contentions and defenses he asserts to carry out the wishes of his clients. In my court, lawyers are encouraged to do this simply by stating, in effect, "At the request of my client, I make these contentions." If there is a point which he thinks has merit, he makes it with no qualification, and it carries with it his personal, professional endorsement. Through the use of such language, however, he withholds his personal, professional endorsement from those contentions which he thinks have no merit but which he must make simply because his indigent client wishes him to.

Special problems arise in the involuntary relationship between lawyer and client. They can be solved, however, if the lawyer always remembers that, although this relationship requires that he must serve his client's wishes, at least to some extent, it is for him alone to determine to what he lends his own personal, professional endorsement, and that it must be withheld from the meritless.

Finally, because a lawyer is a professional serving clients without being their servant and with a high duty to the system for the administration of justice, the professional lawyer is concerned with the system itself and its proper functioning. The effective functioning of the system requires the lawyer to associate himself with movements for judicial reform when it is

1. Gideon v. Wainwright, 372 U.S. 335 (1963).
2. Argersinger v. Hamlin, 407 U.S. 25 (1972).

needed. Indeed, he should consider proposals for reform on their merits and not as they may affect a special interest or particular client. Lawyers are human, I know, and, as humans, I can understand why some lawyers, with a marked preference for federal courts over the state courts in which they practice, oppose any change in federal jurisdiction. I suggest to you, however, that their professionalism is inconsistent with opposition of that sort if founded upon the supposed interest of their particular clients. The ALI proposals, which would narrow the diversity jurisdiction, for instance, should receive objective consideration in the interest of an efficient functioning of a dual system of federal and state courts and not from the point of view of the personal interest or preference of particular lawyers or their clients.

Law reform is a fragile thing. Small but concerted opposition can break it if a large segment of the bar or the public is not aroused, and the public is rarely aroused about law reform. Lawyers can supply the support to accomplish deserving change. Their professionalism requires that they do it. My friend, Bernard Segal, of Philadelphia, calls this the "higher calling of the lawyer and of the bar."

The Commission on Revision of the Federal Appellate Court System has presented a tentative report including a recommendation for the creation of a national court of appeals. Initially, it would be a court of seven judges authorized to take and decide cases upon referral by the Supreme Court or upon transfer by one of the existing courts of appeals. There has long been a shortage of appellate capacity at the highest level in this country. As the volume of cases has swelled, as the number of problems allotted for judicial resolution has grown and grown, the appellate capacity of the Supreme Court has remained constant. Long ago it became inadequate for that court's performance of its assigned role. The Supreme Court itself expressed this as long ago as 1963 in *Fay v. Noia*[3] when it confessed itself wholly unequal to the task of reviewing constitutional questions arising in the state courts in prosecutions for crimes. That marked shortage of appellate capacity within the Supreme Court has long disturbed me and others. Some years ago, I advanced, in writing, a proposal for the creation of a national court of appeals designed to meet the par-

3. 372 U.S. 391 (1963).

ticular problems flowing from *Fay v. Noia*.[4] In a later article,[5] I incorporated a provision for referral by the Supreme Court to the national court of appeals of any kind of case, but the specifics of my proposal encountered the objection that it was too much a specialized court, and that objection was not without some basis in fact. Later, others proposed a greatly enlarged national court of appeals, but their proposals, in my view, were much too amorphous and administratively impractical. Still, there was a growing recognition that something urgently need be done to supplement the appellate capacity of the Supreme Court. The lower federal courts are much too burdened with supervision of state courts in their resolution of federal constitutional questions, and the burden upon the parties of processing such claims through two parallel systems of courts is unconscionable. The Supreme Court attempts to monitor courts of appeals of the United States in this area, but too frequently important problems are left too long unanswered on a national basis.

In other areas, a conflict between the circuits is a basis for granting a writ of certiorari, but conflicts are left unresolved simply because the Supreme Court does not have the resources to do all that should be done in the national interest. Conflicts in cases in which the United States is a party are particularly troubling, for a decision of a court of appeals has no nationally binding force upon any governmental agency. Consider for a moment tax cases. If the Commissioner loses on one contention in a court of appeals, he is bound to treat taxpayers in that circuit consistently with the decision of the court, but he is not required to extend such treatment to the taxpayers in other circuits. He is free to litigate the same question elsewhere in the hope of getting a conflicting decision, and, even if he does, there may be no application to the Supreme Court in that case or the Supreme Court may deny review despite the conflict. The result is widely disparate treatment of taxpayers depending upon where they live. Those who live in states served by one or two courts of appeals may receive favorable treatment from the Commissioner which is denied to taxpayers in all of the remaining states. This is wrong, of course, but matters of statutory construction have a low priority in the

4. Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973).

5. Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597 (1974).

Supreme Court, where constitutional issues are pressed in great numbers.

It is only illustratively that I have mentioned the incapacity of the Supreme Court to review constitutional questions in state court proceedings and tax cases. There are many other classes of cases in which the same problems exist. A national court of appeals taking cases by referral from the Supreme Court, and some by transfer from the present courts of appeals when a prompt need of a national answer is recognized, would greatly relieve these problems. Decisions of the national court of appeals would remain subject to review by the Supreme Court, so that ultimate control would be in the one Supreme Court for which the Constitution provides, but its resources would be effectively supplemented. Litigants, potential parties and the public at large would no longer suffer disadvantages which result from the Supreme Court's lack of adequate appellate capacity to perform its assigned function in the manner which was intended by the Constitution.

And so, as lawyers, as professionals, as I have said, I suggest that it is your professional duty to consider the proposals of the Commission on Revision and to support them, if in your personal, professional opinion they merit support. As professionals, as officers of the courts, as those having special competence for leadership in the improvement of the courts and ultimate responsibility for it, you are entering upon a lofty calling. On the average, you will not make as much money as some other professionals, such as the physicians, but so long as you serve as professionals, you will serve your country and its people well.

You may look about you and see some lawyers who are not performing in the professional manner I have described, but be not the cynic. The practice of law is highly demanding, and, for those who do it professionally, highly rewarding in terms of service of the public good and of satisfaction. If there be those who travel the valleys in the shadows, be you resolved to tread the bright peaks of professionalism.

Good luck and God bless you all.